IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1439

JERRY LEE SMITH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

AMICI CURIAE BRIEF OF THE AMERICAN LIBRARY ASSOCIATION AND THE IOWA LIBRARY ASSOCIATION IN SUPPORT OF PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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INTEREST OF THE AMERICAN LIBRARY ASSOCIATION AND THE IOWA LIBRARY ASSOCIATION.

The American Library Association, founded in 1876, is a non-profit educational organization with its principal place of business located in Chicago, Illinois. Its membership includes more than 34,000 libraries, library trustees and members of the general public who are devoted to the development of library services in the United States. The Association is the chief spokesman for the modern day library movement in North America and, to a considerable extent, throughout the world. Through

its membership and its affiliation with its constituent state library associations, the American Library Association represents 29,000 public, university and special libraries, over 90,000 elementary and secondary and media centers, and over 120,000 librarians. The Iowa Library Association has 1,695 members representing the interests of member libraries, librarians, trustees and friends.

This brief is submitted in the hope that it will assist the Court in deciding to grant certiorari in this case and rule on the important public issues presented therein. The American Library Association and the Iowa Library Association have obtained the written consent of both the Petitioner and Respondent to the filing of this amici curiae brief.*

The interests of the Iowa and American Library Associations in this case relate directly to the central issue presented—whether the conscious determination of a state legislature that the "contemporary community standards" of the state do not require prohibition of the distribution of arguably "obscene" materials to adults can be disregarded by a federal court and jury in the context of a prosecution for an alleged violation of the federal statute prohibiting distribution of "obscene" materials through the United States mails, 18 U. S. C. § 1461.

In 1974, the Iowa Legislature voted to decriminalize the distribution of arguably "obscene" materials to adults within Iowa by enacting Chapter 725 of the Code of Iowa. The petitioner was convicted in a jury trial in the District Court for the Southern District of Iowa on September 9, 1975, for seven violations of the federal statute prohibiting distribution of "obscene" materials through the United States mails, 18 U. S. C. § 1461, and sentenced to three years imprisonment, of which all but six months were suspended. The petitioner was placed on three years probation. The mailings involved all occurred totally within the State of Iowa.

* True copies of the letters evidencing such consent have been lodged in the Clerk's Office.

The District Court refused to acquit the petitioner despite the failure of the government to present any evidence of the "local community standard" by which to measure the "obscene" character of the materials he distributed and refused to rule that the appropriate standard was established by the Iowa Legislature which, in Chapter 725 of the Code of Iowa, had limited the criminal regulation of "obscenity" to distributions to minors. Petitioner appealed the District Court's rulings to the Eighth Circuit Court of Appeals which affirmed per curiam.

The rulings of the District Court and the Court of Appeals permitted the jurors to substitute their own, wholly subjective and unascertainable standard of "obscenity" for the express "contemporary community standard" established by the Iowa Legislature. That result has broad and serious implications for libraries and librarians.

Every library collection includes many works having sexual content, which might arguably be called "obscene" under some subjective standard. These works are frequently transmitted through the mails in connection with inter-library loans and in the library acquisition process. Thus, potentially every work with sexual content in a library collection exposes a librarian to criminal prosecution under federal law, regardless of the fact that the legislature of the state in which the library is located has expressly decided to decriminalize the distribution of "obscene" material to adults.*

Additionally, the Iowa and American Library Associations have a direct interest in this case in furthering the role of librarians as guardians of the freedom to read. The American library is an institution unique to American culture and tradition.

* While libraries and librarians are not engaged in "sexploitation" or the distribution of materials such as those in connection with which petitioner was convicted, the well-recognized "sexual revolution" has been reflected in current literature and periodicals. The public interest in sexual matters makes it logical and necessary for libraries to have materials with sexual content. Some of these materials, such as serious sex education books, are quite explicit.

Libraries are repositories of information and knowledge and are established to preserve and disseminate the records of the world's cultures.

In providing this service in the free society mandated by our Constitution, it is and has been the responsibility of libraries to make available materials presenting all points of view concerning the problems, issues and attitudes of our time. Consequently libraries and librarians have historically resisted efforts to limit their collections only to those materials reflecting attitudes, ideas, and library styles bearing the imprimatur of governmental authority or the approval of a prevailing majority of the populace. As a result, libraries serve as a primary resource for the intellectual freedom required for the preservation of a free society and a creative culture.

This function cannot be fulfilled if libraries and librarians are threatened with the prospects of prosecution under unstated, subjective standards of "obscenity" adopted by the federal courts and juries, despite lawfully designated state "contemporary community standards" decriminalizing the distribution of arguably "obscene" matter. Confronted with the prospects of criminal prosecution, it is beyond question that libraries and librarians will tread a cautious path, omitting from their collections all materials which might possibly be attacked as "obscene." Such a self-censorship program must necessarily suppress constitutionally protected material, thereby violating the First Amendment rights of libraries, librarians, publishers, authors and the people they serve.

It is this interest in the freedom to read and in the preservation of library resources that prompts the American Library Association and the Iowa Library Association to urge the Court to grant certiorari in this case.

REASONS FOR GRANTING THE WRIT.

THIS COURT SHOULD DECIDE THE IMPORTANT CONSTITUTIONAL ISSUE RAISED BY THE IOWA STATUTE'S DECRIMINALIZATION OF "OBSCENITY" AND THE FEDERAL COURT'S SUBSTITUTION OF A DIFFERENT "LOCAL COMMUNITY STANDARD" IN FEDERAL PROSECUTIONS IN IOWA.

The Iowa District Court and the Court of Appeals' resolution of the conflict between Iowa's decision to decriminalize "obscenity" in Iowa and a federal prosecution under 18 U. S. C. § 1461 for an intrastate mailing of allegedly "obscene" matter underscores the necessity for a ruling by this Court on the issue of what community standard should be applied in a federal "obscenity" prosecution.

The courts below improperly relied upon this Court's decision in *Hamling* v. *United States*, 418 U. S. 87 (1974), in reaching their decision to substitute a federal community standard for the express community standard of non-"obscenity" declared by the Iowa Legislature. In *Hamling*, the Court expressly extended the local "contemporary community standard" test adopted in *Miller* v. *California*, 413 U. S. 15 (1973),* to federal prosecutions under 18 U. S. C. § 1461 and stated:

> "The result of the *Miller* cases, therefore, as a matter of constitutional law and federal statutory construction, is to

* In citing to the prevailing Supreme Court definition of "obscenity", the Iowa and American Library Associations intend no endorsement of the Court's definition. Even under that definition, it is impossible to delineate the unprotected from the protected. What appeals to prurient interests, is offensive, or lacks serious value depends upon the viewer or reader. Librarians generally have no knowledge as to the specific purpose for which an individual is utilizing a given library work. Indeed, any requirement that librarians make such an inquiry would create a hostile, oppressive environment which itself would "chill" access to constitutionally protected works.

> permit a juror sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion 'the average person, applying contemporary community standards' would reach in a given case." 418 U. S. at 105.

But, the statement in *Hamling* was made in the context of an 18 U. S. C. § 1461 prosecution for distributions of allegedly "obscene" materials from California to unspecified places throughout the United States. California, the state of origin and the forum state, had adopted a statewide community standard, but left the determination of the content of that standard to the trier of fact. The standards of the states in which the materials were received are not ascertainable from the opinion. The Court did not state what standard applied, it simply noted:

> "Since this case was tried in the Southern District of California, and presumably jurors from throughout that judicial district were available to serve on the panel which tried petitioners, it would be the standards of that 'community' upon which the jurors would draw. But this is not to say that a District Court would not be at liberty to admit evidence of standards existing in some place outside of this particular district, if it felt such evidence would assist the jurors in the resolution of the issues which they were to decide." *Id.* at 105-06.

At least as to California's local community standards, *Hamling* involved no conflict with state law. In contrast, here Iowa, the state of origin and receipt and the forum state, had chosen to adopt a statewide community standard which expressly determined that nothing is "obscene" for adults in Iowa. *Hamling* provides no guidance one way or the other concerning whether this state standard should be applied in an 18 U. S. C. § 1461 prosecution. Yet, the ruling below, that the state standard can be disregarded, creates a direct conflict between federal and state law.

More such conflicts can be expected. This Court has expressly approved state deregulation of "obscenity."

> "[T]he States, of course, may follow such a 'laissez-faire' policy and drop all controls on commercialized obscenity, if that is what they prefer. . . ." *Paris Adult Theater I* v. *Slaton*, 413 U. S. 49, 64 (1973).

Since the issuance of this Court's *Miller* line of cases*, the following states have decriminalized the distribution of "obscene" materials to adults. In addition to Chapter 725 of the *Code of* Iowa, *see* the similar statutes of New Mexico, *N. M. Stat. Ann.* ch. 40 § 50(1)-(8) (Supp. 1975); South Dakota, *S. D. C. L.* § 22-24-28 (Supp. 1975); Vermont, 13 *V. S. A.* §§ 2801-2807 (Supp. 1975); and West Virginia, *W. Va. Code Ann.* ch. 61 § 8A(1)-(7) (Cum. Supp. 1975). Hawaii has repealed its obscenity law, *Hawaii Rev. Stat.* ch. 37 § 712-1212 repealed SL 1973, C. 136 § 10. Further, the State of Alaska regulates only the distribution of "objectionable" comic books. *Alaska Stat. Ann.* §§ 11.40.160-11.40.180 (1973).

In light of changing attitudes towards victimless crimes in general, and "obscenity" in particular, deregulation is not surprising. Rather, it is likely that other states will opt for deregulation simply because "obscenity" laws are "so inherently unenforceable without extravagant expenditures of time and effort by enforcement officers and the courts. . . ." *United States* v. *Reidel*, 402 U. S. 351, 357 (1971). The issues presented in this case are thus ripe for decision by the Court.

This case squarely presents the conflict inherent when a federal community standard is applied to wholly intrastate activity in total disregard of a state's legislative standard. The Court should take this opportunity to resolve the important public issues presented, because the resolution of that conflict by

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* *Miller* v. *California*, 413 U. S. 15 (1973); *Paris Adult Theater I* v. *Slaton*, 413 U. S. 49 (1973); *Kaplan* v. *California*, 413 U. S. 115 (1973); *United States* v. *12 200-ft. Reels of Film*, 413 U. S. 123 (1973); *United States* v. *Orito*, 413 U. S. 139 (1973).

the courts below places libraries and librarians in an intolerable situation.*

A librarian can never know in advance what local community standard will be applied. If the state in which a library is located has chosen to deregulate the distribution of "obscenity," how can librarians determine what the local community standards are? Presumably, hard core pornography will be readily available in the community.

Moreover, where arguably "obscene" materials are sent interstate through the mails, *i.e.*, when making an inter-library loan, two standards may apply—that at the point of shipment or that at the point of receipt. If the standard at the point of receipt controls, how is the librarian to know what the local standard is of a community with which he or she is not familiar? The Court's decision in *Hamling* does not answer these vital questions.

The District Court and Court of Appeals' answer, leave the determination of the standard to the discretion of the jury, serves only to subject librarians to possible prosecution under unstated, subjective standards of "obscenity", notwithstanding the existence of explicit state "community standards" decriminalizing the distribution of "obscene" matter. The existence of dual "contemporary community standards" thus renders the definition of "obscenity" under 18 U. S. C. § 1461 hopelessly vague. There is no fair notice of what is prohibited in this situation.

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* The Court recently denied certiorari in *Danley* v. *United States*, 523 F. 2d 369 (9th Cir. 1975), *cert. denied*, 44 U. S. L. W. 3469 (February 23, 1976), which also involved a conflict between Oregon's deregulation of "obscenity" and an 18 U. S. C. § 1461 prosecution. However, the record there reflected interstate shipments of the allegedly "obscene" materials, and is distinguishable on that basis. Nonetheless, that decision further supports the necessity for a ruling by this Court at this time on the issues presented in this case.

The judicially sanctioned abrogation of a valid state or local community standard invites self-censorship, a result clearly disfavored by this Court. As stated in *Smith* v. *California*, 361 U. S. 147, 154 (1959):

> "The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded."

Self-censorship by librarians is even more virulent in its effect on the public and its right to read. Confronted with the prospect of criminal prosecution under differing standards, the librarian will be coerced to "err on the side of caution" and to purge his collection of all works having sexual content.

It is not the purpose of this brief to argue the legal merits of the issue posed by petitioner. At the appropriate time the American and Iowa Library Associations are prepared to support their contention that the federal courts improperly substituted a "federal community standard" in this prosecution for the conscious determination of the state legislature that the "contemporary community standards" in Iowa do not require a prohibition on the distribution of arguably "obscene" materials to adults. The purpose of this brief is to persuade this Court of the importance of this issue to librarians and to all other persons concerned with the dissemination of literary and other works.

The loss which will result from purges by librarians of their library collections will not be merely a loss of commercial profits, but a loss of public access to knowledge, to ideas, to artistry and to literary experience. It will be an irreparable loss for there is no judicial review of the self-censorship decisions which of necessity will result.

CONCLUSION.

We respectfully urge that the Court grant certiorari in this case.

Respectfully submitted,

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